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Supreme Court, U.S.
FILED
MAR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No._____

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1986

Ralph A. Applegate

Petitioner,

V.

DEBROVIR, OAKES & GEBHARDT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Ralph A. Applegate
Petitioner Pro Se
1544 Zettler Road
Columbus, Ohio 43227
614-235-9965

QUESTION PRESENTED

Where highest Ohio state court had construed its Ohio statute, where highest District of Columbia (state) court subsequently followed highest Ohio state court construction in construction of District of Columbia statute allowing Applegate (or anyone) to call Dobrovir at trial as expert, where Applegate had repeatedly made this demand, and subsequent District of Columbia (state) court unsettled first District of Columbia (state) court construction of statute where lawyer had not demanded calling adverse physician himself, had federal district and appellate court abused their power in ignoring and refusing to follow United States Supreme Court's instruction that federal court in

diversity case must construe state statutes, in fashion courts of states have construed said statutes.

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In The

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RALPH A. APPLEGATE,

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V.

DOBROVIR OAKES & GEBHARDT

Respondent.

_____ 0 _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The Petitioner, Ralph A. Applegate respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 22, 1987.

JURISDICTIONAL STATEMENT

CIRCUMSTANCES

Applegate questions appellate and district court failure to properly construe Ohio and D.C. statutes.

PARTIES

All parties are listed in the caption.

OPINIONS BELOW

District court decision was reported at 628 F.Supp.378, December 2, 1985.

Court of appeals memorandum decision of January 22, 1987 affirmed the district court decision. Appendix B.

Court of appeals en banc order of February 27, 1987 denied Applegate's request for rehearing. Appendix C.

GROUNDS FOR JURISDICTION

Invoking federal jurisdiction under 28USC1332, Applegate brought suit in the Southern District of Ohio, Eastern Division on June 9, 1983 for legal malpractice. After transfer, on September 18, 1985 J. Oberdorfer took jurisdiction over the Dobrovir partnership at Dobrovir's suggestion under Ohio Revised Code 2307.24. On December 2, 1985 J. Oberdorfer rendered summary judgment in favor of Dobrovir on the basis of failure of Applegate to identify an expert, and denied Applegate remedy and relief; without considering Applegate's right and demand to question Dobrovir at trial as expert adverse witness, decision reported at 628F. Supp.378 (D.D.C. 1985)

The court of appeal had jurisdiction pursuant to 28USC1291; affirmed district court decision on January 22, 1987, with little elaboration, finding only a malpractice plaintiff may question defendants_ _ _ as experts where credibility is the primary issue in the case; contrary to Oleksiw v. Weidener, 207N.E.2d375 (S. Ct. Ohio 1965), Abbey v. Jackson, 483A2d330, 333 (D.C. App. 1984), and Sartor v. Arkansas Gas Corp., 321 U.S. 620, and others; and denied Applegate's petition for rehearing en banc on February 27, 1987, stating that no mention of the court requested the taking of a vote thereon.

The jurisdiction of this court to review the judgment of the D.C. Circuit is invoked under 28USC1254(1).

STATUTES INVOLVED

FEDERAL

	Appendix Page
28 USC 1254	A-1
28 USC 1291	A-1
28 USC 1332	A-2

STATE STATUTES

O.R.C. §2307.24	A-2
O.R.C. §2317.07	A-3
D. C. Code 1981 §14-301	A-3

STATEMENT OF CASE

In 1965 Ohio S. Ct. granted Oleksiw's right under O.R.C. 2317.07 to call defendant physician Weidener on direct at trial as to standard of care after trial court had directed verdict and appellate court affirmed for Weidener even though Oleksiw had made such pretrial demand. Oleksiw v.

Weidener, 207N.E.2d375.

On December 22, 1980 Lowell Ralph, government lawyer, in Applegate's underlying action, falsified under oath in discovery papers. In 1981 and 1982, Dobrovir, after destroying Applegate's instructions about evidence Lowell Ralph falsified about in 1980, refused to consider, and concealed said evidence from court, forcing Applegate to settle underlying case Applegate would otherwise have won. On October 21, 1982 D. C. App. Ct. affirmed trial court's directed verdict to lawyer Bergan where O'Neil had not cited D. C. Code 1981, §14-301, nor demanded calling Bergan, instead demanded calling Webster, defense trial counsel. O'Neil v. Bergan, 452A.2d337. Applegate brought Ohio and Washington D.C. malpractice action

in 1983. Applegate repeatedly argued in 1983, 1984, and 1985 in 8 oral hearings that Applegate would make his case "out of Dobrovir's mouth".

On October 30, 1984 D.C. App. Ct., citing Oleksiw, stated _ _ _Whatever may be the validity (or lack thereof) of the argument that a lawyer or his client has unfairly avoided the bother and expense of using his own independent experts, this argument has no merit where the witness is not an expert hired by the adversary but is the adversary himself_ _ _actually involved in the events from which the claim arose, and sustained Abbey's right to call defendant physician Jackson under D.C. Code 1981, §14-301, where Abbey identified Jackson as defendant who could be called to testify. Neither state statute is construed to limit

situations in which the defendant expert may be called under adverse witness statutes. Abbey v. Jackson, 483A.2d330, 333, 334. On August 29, 1985 Dobrovir brought Eibl to district court attention, where Eibl had not demanded right to call defendant physician Kogan on direct at trial, instead attempted, as in O'Neil, to call defense witnesses other than Kogan, and D.C. App. Ct. granted summary judgment to Kogan, Eibl v. Kogan, 494A.2d641. Until Applegate, not one plaintiff had demanded right under adverse witness statutes to call defendant lawyer as expert. District court ignored Applegate's demands which had been made in numerous status calls and on October 9, 1985 and gave summary judgment to Dobrovir on December 2, 1985. On October 29,

1986 8th Cir. Ct. of appeals stated_ _ . Party to suit has right to call another party to suit as adverse witness at any time in trial, when both sides are aware that party has relevant knowledge of facts at issue. Morefield v. Kehm, 803F2d1452. D.C. Cir. continues to ignore Applegate's statutory right even though Dobrovir has relevant knowledge of facts at issue.

REASONS FOR GRANTING WRIT

The question presented is of plenary importance because said question has been raised before this court for the first in a legal mal-practice action. Wigmore explains the foundation of the confrontation rule to provide the opponent with the opportunity to cross examine adverse witnesses. Wigmore, Evidence §1395. Expert testimony like all opinion

testimony, presents issues of credibility (contrary to D.C. Fed. App. Ct.) best resolved at trial. Sartor v. Arkansas Gas Corp., 321U.S.620. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. Jack Anderson v. Liberty Lobby, Inc., No. 84-1602, June 25, 1986. 54LW4755,4762. J. Brennan dissenting. But as long as credibility is exclusively for the jury, it seems the court's analysis would still require this case to be decided by that body. Id., p. 4763. J. Rehnquist dissenting. In construing a state statute, the federal courts will follow the construction placed thereon by the

highest court of the state. Mellon v. St. Louis Union Trust Co., 225F.693 (8th Cir. 1915). It is fundamental that when a statute is clear on its face courts should apply the language of the statute without attempting to find meaning elsewhere. Ex Parte Collett, 337U.S.55, 61 (1949). It is thus important to note precisely the purpose and effect of the statute as the state court has construed it. Near v. Minnesota Ex Rel Olsen. 283U.S.697, 709 (Headnote 5). (1931). Questions Reviewable.

ERROR IN APPLYING STATUTE

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated this 16th day of March, 1987, at Columbus, Ohio.

Ralph A. Applegate

Ralph A. Applegate
Petitioner Pro Se
1544 Zettler Road
Columbus, Ohio 43227
614-235-9965

CERTIFICATE OF SERVICE

I hereby certify that I am the Petitioner pro se in the case at bar and that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court, I this day served three (3) copies of the foregoing Petition for Writ of Certiorari to John Coyne, counsel for Respondent required to be served. Service was accomplished by

mailing the copies first class and postage prepaid to counsel at the following address:

John Coyne
Jordan Coyne Savits & Lopata
1030 Fifteenth Street, N.W.
Washington, D.C. 20005

Ralph A. Applegate

Ralph A. Applegate
Date: March 18, 1987

APPENDIX A

FEDERAL STATUTES

28USC1254 Courts of appeals; certiorari; appeal; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28USC1291. Final decisions of district courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

28USC1332. Diversity of citizenship; amount in controversy; costs. (a) The district courts shall have original jurisdiction of all civil actions where the matter is controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between (1) citizens of different states.

OHIO STATUTES

O.R.C. §2307.24 Partnership may sue or be sued by its name. A partnership formed for the purpose of carrying on a trade or business in this state may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known.

O.R.C. §2317.07 Examination of parties. At the instance of the adverse party, a party may be examined as if under cross-examination, orally, by way of deposition, like any other witness, by way of written interrogatories filed in the action or proceeding, or by any one or more of such methods. The party calling for such examination shall not thereby be concluded but may rebut it by evidence.

DISTRICT OF COLUMBIA STATUTES

D.C. Code 1981 §14-301. Parties and other interested persons generally. Except as otherwise provided by law, a person is not incompetent to testify in a civil action or proceeding by reason of his being a party thereto or interested in the result thereof. If otherwise competent to testify, he is competent to give evidence on his own

behalf and competent and compellable to give evidence on behalf of any other party to the action or proceeding.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6198 September Term, 1986

C.A. No. 83- 3534

Ralph A. Applegate, Appellant

V.

Dobrovir, Oakes & Gebhardt, et al.,

Appellee.

Filed January 22, 1987

George A. Fisher

Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: RUTH B. GINSBURG AND WILLIAMS, Circuit Judges, and McGOWAN, Senior Circuit Judge.

JUDGMENT

This case came to be reviewed on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. The court has considered the issues presented and finds they occasion no need for a further published opinion. See D.C. Cir. Rule 13(c). For the reasons set forth in the district court's opinion, 628F.Supp.378 (D.D.C. 1985), and in the accompanying memorandum it is

ORDERED and ADJUDGED by the court that the judgment of the district court from which this appeal has been taken is affirmed. It is

FURTHER ORDERED by the court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of

any timely petition for rehearing. See D.C. Cir. Rule 14.

Per Curiam

Bills of cost must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of cost out of time.

MEMORANDUM

Pro se appellant Ralph A. Applegate brought an action in the United States District Court for the Southern District of Ohio against his former counsel, appellee Dobrovir, Oakes and Gebhardt, claiming professional malpractice and fraud and tortious misrepresentation. Pursuant to 28 U.S.C. §1404(a), the case was transferred to the United States District Court for the District of Columbia.

The district court referred the case to a magistrate for discovery and pretrial proceedings. After extensive discovery and a pretrial conference, the magistrate filed with the court a report recommending that appellee's motion for summary judgment be granted. The court postponed the trial and held an extended hearing on the summary judgment motion. Considering the motion de novo, and addressing appellant's objections to the magistrate's report, the district court granted the motion, and ordered summary judgment in favor of appellee. 628 F.Supp. 378 (D.D.C. 1985). Finding the district court's grant of appellee's motion for summary judgment clearly correct, we affirm.

Except where the trier of fact can evaluate an attorneys' lack of care and skill as a matter of common

knowledge, the plaintiff in a legal malpractice case must submit expert testimony proving the applicable standard of care. O'Neil v. Bergan, 452A.2d337 (D.C. 1982). Because appellant's malpractice claims were not within the "common knowledge" exception, appellant's failure to produce an expert precluded him from establishing a prima facie case of negligence.

The district court did not err in refusing to allow appellant to examine the defendant attorney as his expert. A malpractice plaintiff may question defendants and defense witnesses as experts where credibility is the primary issue in the case. See Abbey v. Jackson 483A.2d330 (D.C., 1984). However, where the applicable standard of care is in dispute, a malpractice plaintiff must produce independent expert

testimony. See Eibl v. Kogan, 494A.2d 640(D.C. Cir. 1985). Because appellant and appellee contest the applicable standard of care-i.e., the extent to which an attorney is bound to follow client instructions in conducting a case - appellant was required to produce independent expert testimony.

The district court's failure to appoint an expert for appellant was not error, for the authority to appoint an expert under Fed. R. Evid. 706 is not an instruction to do so-to the contrary, the authority should be exercised only in compelling circumstances. See United States Marshals Service v. Means, 741F.2d 1053 (8th Cir. 1984) (en banc).

In sum, because appellant did not produce independent expert testimony, summary judgment on the malpractice

claim was properly granted in appellee's favor.

The district court was also correct in granting summary judgment on appellant's fraud and misrepresentation claim. Appellee submitted an affidavit attesting to the truth of the statement that appellant alleges was fraudulent. Appellant failed to submit competent evidence to the contrary; therefore the facts averred in the affidavit must be deemed established. MacNeil v. Columbia Broadcasting System, 66 F.R.D. 22, 27 (D.D.C. 1975). Thus, no genuine issue of material fact existed and the district court properly ordered summary judgment in favor of appellee on the fraud claim.

The court has considered appellant's other claims on appeal and

has determined them to be without merit.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6198 September Term, 1986

CA No. 83-3534

Ralph A. Applegate

V.

Dobrovir, Oakes & Gebhardt

Filed February 27, 1987

George A. Fisher

Clerk

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges; McGowan, Senior Circuit Judge

O R D E R

Appellants' petition for rehearing en banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that appellant's petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A FISHER,
CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH A. APPLEGATE,	)
	)
Plaintiff,	)D.C.C.A.
	)No. 83-3534
V.	)
	)S.D. Ohio
DOBROVIR, OAKES & GEBHARDT,	)C.A. No. 83-
	) 1038
Defendants.	)
	)NOTICE OF APPEAL

Notice is hereby given that Ralph A. Applegate, plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Final Order entered in this action on the 2nd day of December.

Pursuant to Fed. R. App. Proc. 10(b)(1) and (2), inasmuch as appellant is in Ohio, and unaware fully of all proceedings not already on file, appellant orders from the reporter

transcripts of all parts of the proceedings not already on file, including but not limited to Judge Oberdorfer's oral hearing in C.A. No. 83-1749 of October 26, 1983, every record of telephone calls made by counsel for Dobrovir to Judge Oberdorfer's chambers, including Judge Oberdorfer's law clerks and including return calls from Judge Oberdorfer and his law clerks to counsel for Dobrovir, every record of telephone calls made by counsel for Dobrovir to Mag. Burnett's chambers, including Mag. Burnett's law clerks, specifically law clerk Falk and including return calls from Mag. Burnett and his law clerks to counsel for Dobrovir, record of conference call of May 9, 1985, records of phone calls between appellant and Mag. Burnett's law clerks and

returns concerning Mag. Burnett's failure to provide appellant pre trial instructions, including transcripts of every oral hearing and pre trial conferences before Judge Oberdorfer and Mag. Burnett. Appellant is aware by receipt of copies of transcript from Roanoke Times & World News of the May 9, 1985 conference call and that may not need to be filed.

Appellant requests copies of local rules of the D.C. Appellate Court including any instruction directed to pro se civil appellants.

December 6, 1985.

Ralph A. Applegate

Ralph A. Applegate
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